

APPEAL NO. 031401
FILED JULY 21, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 28, 2003, with the record closing on May 14, 2003. The hearing officer resolved the disputed issues by deciding that: (1) the Texas Workers' Compensation Commission (Commission) does have jurisdiction to adjudicate the issues of maximum medical improvement (MMI), impairment rating (IR), and disability; (2) the respondent's (claimant) date of MMI is August 23, 1999, the date of statutory MMI; (3) the claimant's IR is 20%; (4) the claimant had disability from August 26, 1997, and continuing through January 25, 1998, and beginning again on June 27, 1998, and continuing through August 23, 1999, the claimant's date of statutory MMI; and (5) that claimant's preinjury average weekly wage (AWW) was \$313.19. The appellant (carrier) appealed, asserting that the Commission does not have jurisdiction to adjudicate the disputed issues, that the hearing officer erred in determining MMI, IR, and disability; and that the hearing officer erred in calculating the claimant's AWW to be \$313.19, rather than \$274.73. The claimant responded, urging affirmance of the hearing officer's determinations, and that the hearing officer properly determined that the claimant's AWW, and in the alternative, the claimant's AWW should have been based on a fair, just and reasonable determination and found to be \$348.02.

DECISION

Affirmed in part, and reversed and rendered in part.

JURISDICTION

The procedural history in this case is undisputed. A previous CCH was held on February 2, 1998, with the record closing on April 6, 1998, and the hearing officer resolved the disputed issues by determining that: (1) the claimant did not dispute his first IR within 90 days and it consequently became final in accordance with 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); (2) that the claimant reached MMI on February 25, 1997, with a zero percent IR; and (3) that the claimant had disability from August 6, 1997, through January 26, 1998. Both sides appealed the aspects of the decision that were adverse to their respective positions and the Appeals Panel affirmed the hearing officer's determinations in Texas Workers' Compensation Commission Appeal No. 980944, decided on June 22, 1998. Both the claimant and the carrier sought judicial review of the Appeals Panel decision with the (District Court).

On August 2, 2002, the 3rd District Court issued an Order on the claimant's Motion for Summary Judgment and held that:

The [Fulton v. Associated Indem. Corp., 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied)] case has become final, review having been denied by the Texas Supreme Court.

As a result of the [Commission's] focus upon the asserted failure of the [claimant] to comply with the ninety (90) day rule which has now been declared invalid by the Fulton case, the issues pertaining to disability, [MMI] and impairment remain within the jurisdiction of the [Commission].

IT IS FURTHER ORDERED that the [Commission] does retain jurisdiction over the issues of disability, date of [MMI and IR] and should either party wish to appeal one or more issues following further proceedings at the Commission level, such party may do so.

In Fulton the court held that Rule 130.5(e) restricted the time period for disputing an IR and that it was invalid because it also implicitly restricted the statutory time period for assessing a final date of MMI. Following the decision in Fulton, the Commission repealed Rule 130.5(e) effective January 2, 2002.

The issue before the hearing officer was whether the Commission has jurisdiction to adjudicate the issues of MMI, IR, or disability. The carrier repeated the same arguments that it had asserted at the CCH, specifically that this case is pending on the docket of the District Court and that the Commission had previously adjudicated the disputed issues. In addressing both arguments, the hearing officer essentially commented in his statement of evidence that the case was docketed for June (June 24, 2003) to simply "prevent the case from falling through the cracks" after the court granted the claimant's Motion for Summary Judgment, since the case on the disputed issues was in effect remanded to the Commission. The hearing officer was persuaded by the language of the Order granting the Motion for Summary Judgment that "the district court intended that the next decisions on [MMI, IR,] and disability be handled by the dispute resolution process of the Commission."

The carrier argues that the hearing officer failed to follow the precedent of Texas Workers' Compensation Commission Appeal No. 010802, decided May 31, 2001, to determine that a district court may not remand a case to the Commission, thus the Commission does not have jurisdiction to adjudicate MMI, IR, and disability. We distinguish that case from the present case, in that the district court's judgment stated that prior to the submission of this case to a jury, the parties stipulated that due to the complexity of the Commission's Rules concerning the "duration of disability" that is due to the claimant, that it would be appropriate to submit the issue of the duration of disability to the [Commission]. The parties further stipulated that if the Commission refused to accept jurisdiction on the issue of the duration of disability, the matter would then be submitted to the district court for the determination of that issue. The Commission refused to accept jurisdiction of the time period adjudicated by the previous hearing officer (i.e. from the date of injury to the date of the first CCH) and the Commission would only consider the time period after the first CCH (i.e. from the date

after the first CCH through the date of the second CCH). Neither party appealed that action by the Commission to the district court. The Appeals Panel opined that “the unappealed District Court decision is res judicata on the existence of disability for only the period from March 26, 1996, through October 7, 1997 [(i.e. from the date of injury to the date of the first CCH)]. While there appears to have been an incomplete resolution of that matter at the district court level, there is no provision in the 1989 Act for a remand, even by agreement, of issues to the Commission by the District Court.” In the instant case, the District Court held that the Commission retains jurisdiction of the claimant’s MMI, IR and disability. We conclude that the hearing officer did not err in applying Appeal No. 010802, *supra*, to the facts of this case.

The hearing officer did not err in determining that the Commission has jurisdiction to adjudicate the issues of MMI, IR, and disability. We agree with his reading of the Order granting the Motion for Summary Judgment as returning the issues to the Commission dispute resolution process.

MMI AND IR

The parties stipulated that on _____, the claimant sustained a compensable injury to his lumbar spine; that Dr. B, the first Commission-appointed designated doctor, was appointed in 1997; and that Dr. L, the second Commission-appointed designated doctor, was appointed in 2001. Sections 408.122(c) and 408.125(e) provide that for a claim for workers’ compensation benefits based on a compensable injury that occurs before June 17, 2001, the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI and the IR on that report unless the great weight of the other medical evidence is to the contrary. Dr. L determined that the claimant reached MMI on August 23, 1999, with a 20% IR. The hearing officer found the date of MMI and IR as assigned by Dr. L are not contrary to the great weight of the other medical evidence, and that Dr. L’s report was entitled to presumptive weight. We conclude that the hearing officer’s MMI and IR findings are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

DISABILITY

Disability is a question of fact for the hearing officer. The hearing officer reviewed the record and decided what facts were established. The hearing officer determined that the claimant was unable to obtain or retain employment at wages equivalent to the claimant’s preinjury wage beginning on August 26, 1997, and continuing through January 25, 1998, and beginning again on June 27, 1998, and continuing through August 23, 1999, the date of statutory MMI. We conclude that the hearing officer’s disability determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

AWW

The carrier asserts that the hearing officer erred in calculating the claimant's AWW to be \$313.19, rather than \$274.73. We agree. Section 408.041(a) provides that the AWW of an employee who has worked for an employer for the 13 weeks immediately preceding an injury "is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13." It is undisputed that the claimant was paid bi-weekly. The hearing officer calculated the claimant's AWW based the claimant's income for 14 weeks prior to the date of injury, using the figures of a wage print-out in evidence. The claimant's employment wage print-out reflects that the wages for the 14 week time period is \$3,846.20. The AWW is calculated by dividing \$3,846.20 (wages) by 14 weeks, that equals \$274.73. We conclude that the hearing officer miscalculated the claimant's AWW to be \$313.19. The claimant's AWW is \$274.73.

We affirm the hearing officer's jurisdiction, MMI, IR, and disability determinations. We reversed the hearing officer's determination that the claimant's AWW is \$313.19, and render a new decision that the claimant's AWW is \$274.73.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**MR. JIM MALLOY
AMERICAN INTERNATIONAL GROUP
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.**

Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge.